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In The

Supreme Court of the United States

October Term, 1976

No. 76-247

OSCAR GRUSS and OSCAR GRUSS & SON,

Petitioners,

vs.

THE CURTIS PUBLISHING COMPANY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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OPINIONS BELOW

All opinions below are as set forth in the appendix to the petition herein.

JURISDICTION

Jurisdiction is as stated in the petition.

QUESTIONS PRESENTED

1. Did petitioners comply with the procedures mandated by the Pennsylvania Business Corporation Law for the exercise of appraisal rights?

2. Did petitioners prove that the portion of respondent's proxy statement dealing with appraisal rights, including the printing of the relevant statutes, was false and misleading under the standard of materiality imposed by this Court and by the United States Court of Appeals for the Second Circuit?

STATUTES, RULES AND REGULATIONS INVOLVED

The statutes, rules and regulations involved are those which are set forth in the opinion of the Court of Appeals and elsewhere in the appendix to the petition.

STATEMENT OF THE CASE

The facts and proceedings below are fully and fairly summarized in the opinion of the Court of Appeals appended to the petition at pages 1a through 9a and reported at 534 F.2d 1396. The Statement of the Case set forth in the petition is argumentative, inaccurate and incomplete. Rather than repeat the facts as accurately summarized by the Court of Appeals, respondent respectfully directs the Court's attention to such summary and requests that the Court disregard petitioners' statement to the extent that it differs. However, respondent would like to offer the following comments in response to certain statements set forth by petitioners, as follows:

(a) The reason ascribed by petitioners to their decision to commence an action in the federal court (P5a)* is not only argumentative and conjectural, but is also illogical. The so-called "State claim" was not in the nature of a valuation proceeding under the Pennsylvania Business Corporation Law, but was a

* Page references prefixed with letter "P" refer to appendix to petition.

demand for relief on the ground that respondent had violated that statute by refusing to pay the fair value of the shares. Accordingly, the cause of action could not have been premised on petitioners' inability to predict what the Pennsylvania courts would do. Furthermore, petitioners alleged full compliance with the Pennsylvania statute in their State claim, an allegation which, as will be discussed elsewhere, they did not and were unable to prove.

(b) Petitioners, on pages 6 and 7 of their petition, confuse the holdings of the Court of Appeals and the bases therefor. The grounds for the determination of the two causes of action in favor of respondent were entirely separate and distinct. The State claim was rejected because petitioners had failed to prove that they had been deprived of their appraisal rights under the Pennsylvania Business Corporation Law. The federal claim was rejected because the proxy material had not been shown to be false and misleading. The rejection of one claim in no way mandated or even suggested the upholding of the other claim. Petitioners' description thereof only serves to obfuscate the issues. Furthermore, the Court of Appeals did not find that petitioners' appraisal rights had veen violated, as petitioners state.

(c) On page 8 of the petition, petitioners state that "the appraisal rights had not been time barred and nothing in the record supports the Court of Appeals' surmise that they had." This statement is untrue. As is discussed in detail in this brief, petitioners' rights had in fact been time barred because petitioners had failed to serve a demand required under the Pennsylvania Business Corporation Law and had failed to commence a valuation proceeding thereunder, both of which acts had to be performed within certain specified time periods. Inasmuch as the relevant statute is a part of the record herein, the statement of the Court of Appeals is both correct and supported. Incidentally, in that connection, respondent at no time made any concession respecting petitioners' compliance

with any of the requirements of the appraisal statute beyond the initial notice and demand. The limited and restricted nature of respondent's concession, to the extent that there was a concession at all, is clearly and specifically spelled out in the transcript of the trial (A98-104).

For the sake of facilitating the Court's consideration of this matter, all page references by respondent to the opinion of the Court of Appeals and to other underlying documents shall be to the appendices to the petition herein, unless otherwise noted.

REASONS FOR DENYING THE WRIT

I.

Petitioners misconstrue the basis of the Court of Appeals' decision with respect to the Pennsylvania Business Corporation Law.

The Court of Appeals reversed the judgment below on two grounds; first, that petitioners failed to show that they had been deprived of their appraisal rights under the Pennsylvania Business Corporation Law (P6a), and second, that petitioners failed to show that the Proxy Statement was false and misleading (P7a). This point is intended to respond to petitioners' argument respecting the former ground.

Petitioners' entire argument addressing this ground is based upon its assumption that the Court of Appeals reversed solely because it was disturbed that petitioners had failed to use the Pennsylvania courts. This assumption is completely incorrect. What the Court of Appeals determined was that the petitioners had failed to prove compliance with the requirements

enumerated in §515 of the Pennsylvania Business Corporation Law and had failed to commence a valuation proceeding thereunder. The court specifically held that the petitioners had failed to show that they were "in fact deprived of the appraisal rights accorded by the Pennsylvania Business Corporation Law." (P6a).

Appraisal rights are not ordained in heaven. They are afforded to shareholders under the relevant statute of the state of incorporation. In order to exercise these rights, shareholders must comply with the requirements of that statute, a fact that is conceded by petitioners on page 13 of their petition. In this case, the petitioners failed to establish that they had complied with the statute, for the simple reason that they had not done so.

Under §515, in order for a shareholder to obtain the fair value of his shares through a court proceeding, he must do the following:

(a) File a written objection to the Plan (§515B, P47a). Petitioners attempted to comply with this requirement, but did so through notice by the beneficial owner rather than the record holder. This error is proven by reason of the written objection itself (P5a, n. 4), which states that "I am the beneficial owner," and is conclusively established by the direct concession thereof at the trial by petitioners' witness (86a, Joint Appendix on Appeal). The lower court found that the objection was improperly exercised, while the Court of Appeals indicated that a Pennsylvania court might disagree.

(b) Make a written demand for payment within twenty (20) days after the vote (§515B, P47a). Petitioners attempted to do so.

(c) If no agreement has been reached as to fair value, then, between sixty (60) and ninety (90) days after the effective date of the plan, the shareholder should demand valuation proceedings

(§515F, P50a). Petitioners neither made nor attempted to make this demand. A reading of the statute makes it clear that such demand is an absolute prerequisite to the institution of valuation proceedings. Accordingly, the Court of Appeals was completely correct in its determination that petitioners failed to show that they were deprived of their appraisal rights and, indeed, went "rushing into the federal court in New York" (P7a).

(d) If, after the demand described in sub-paragraph "(c)" above, the corporation fails to commence a valuation proceeding, the shareholder can do so in the Pennsylvania courts within thirty (30) days after the expiration of the ninety (90) day period. Again, petitioners failed to comply with this prerequisite. No valuation proceeding was ever commenced by petitioners in state or federal court.

The statutory requirements and the conduct of petitioners, as described above constitute the gist of the decision of the Court of Appeals. In their haste to leave the State of Pennsylvania for the possibly greener pastures of New York, petitioners neglected to perform the acts which they were required to perform under Pennsylvania law. Having failed to do so, they were thereafter time-barred. Therefore, petitioners could not and did not prove, as they alleged in Paragraph 25 of their complaint (the Pennsylvania cause of action), that they "fully complied with all the requirements of Sections 1515 and 1810 (sic) of the Pennsylvania Business Corporation Law and thus are entitled to receive the fair value of their shares pursuant thereto" (11a, Joint Appendix on Appeal). In order for petitioners to prevail, they would have to have shown that they had made the necessary demands, had commenced the valuation proceeding described by the statute, and had somehow been deprived of their rights thereunder. Petitioners might have attempted to commence the valuation proceeding itself in the federal court in conjunction with their cause of action under the Securities Exchange Act of 1934, under the theory of pendent jurisdiction, although the Pennsylvania statute is explicit in its statement that the jurisdiction of the Pennsylvania Court of Common Pleas is

"plenary and exclusive" (P4a). However, the commencement of such a cause of action would have to be in compliance with both the time and procedural requirements of the Pennsylvania Business Corporation Law, neither of which were met. Furthermore, the cause of action as stated in petitioners' complaint was clearly not a valuation proceeding under the statute, but was instead a plea for relief due to the alleged deprivation of their rights under such statute. As the Court of Appeals held, the petitioners apparently assumed that they would lose the valuation proceeding and rushed off to federal court in New York without bothering to comply with the Pennsylvania Business Corporation Law.

II.

The Court of Appeals' holding that petitioners failed to show that the Proxy Statement was false and misleading was proper and was in harmony with applicable precedent.

Petitioners argue that the Court of Appeals' decision jeopardizes the ability of dissenting shareholders to exercise their appraisal rights. This argument is wholly without merit. Any shareholder who properly exercises his appraisal rights in compliance with the applicable and relevant statute will be in no way affected or jeopardized by this decision. Petitioners, in making this argument, avoid reality and completely ignore the facts of this case: that one petitioner is a sophisticated brokerage house and the other a general partner thereof; that respondent used the identical material respecting appraisal rights commonly used by Pennsylvania attorneys and corporations; and that petitioners were the only parties who have ever claimed to have been misled by such material, not only in this instance but apparently throughout the history of Pennsylvania corporations. Furthermore, the Court of Appeals' decision is directly in keeping not only with the standard of materiality previously adopted by the Second Circuit in *Gerstle v. Gamble-Skogmo, Inc.*, (478 F.2d 1281 (1973)) but also with the Supreme Court's decision in *Mills v. Electric Auto-Lite Co.*, (396 U.S. 375 (1970))

and its recent affirmation of the *Gerstle* interpretation in *TSC Industries, Inc. v. Northway, Inc.*, (Docket No. 76-1471, June 14, 1976).

In conclusion, it must be pointed out that the "manifest injustice" to which petitioners refer was neither as manifest nor as much of an injustice as they claim. To begin with, under the decision of the Court of Appeals petitioners will now receive the common shares of respondent under the same formula as was used in the initial reorganization plan. They will, therefore, be in the same position as the scores of shareholders of respondent who voted affirmatively for that plan. Secondly, it was not respondent who caused petitioners to wait until the last possible moment to attempt to exercise the appraisal right, and then, perhaps caused by their haste or perhaps merely by their carelessness, to do so in an improper fashion. Thirdly, respondent had no hand in the determination of petitioners to ignore the clear and simple statutory requirements of the Pennsylvania Business Corporation Law and, perhaps with visions of sugar plums and dollar signs dancing in their heads, to dash off to New York for the purpose of obtaining jurisdiction there. In view of the incredible valuation found by the District Court (see comment of Judge Friendly, P6a, Note 7), petitioners anxiety was understandable.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

s/ Theodore L. Marks
Attorney for Respondent